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GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

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LT. GOVERNOR

February 6, 2019

The Honorable Dana Nessel
Attorney General
Department of Attorney General
G. Mennen Williams Building
Lansing, Michigan 48933

Dear General Nessel,

I write pursuant to MCL 14.32 seeking your opinion on questions of law relating to Public Acts 267 and 268 of 2018, and the Environmental Rules Review Committee and the Environmental Permit Review Commission created by those laws.

On November 9, 2017, Senate Bills 652 and 653 were introduced in the Michigan Senate, seeking to create, respectively, an Environmental Rules Review Committee and a Permit Appeal Panel (later named the Environmental Permit Review Commission).

Michigan is one of a few states that administers several environmental programs based upon delegated authority from the federal government, and has proudly done so since at least the 1980s. On March 16, 2018, the Michigan Department of Environmental Quality ("MDEQ") sent a letter to the United States Environmental Protection Agency ("EPA"), requesting the EPA's opinion on whether this proposed legislation complied with federal legal requirements that were binding on the State of Michigan in its administration of the Clean Water Act and the Clean Air Act. In particular, the MDEQ asked the EPA whether enactment of this legislation would revise Michigan's programs administering the Clean Water Act and, if so, if it would expose those programs to being withdrawn by the EPA. Additionally, the MDEQ asked the EPA whether the legislation complied with conflict-of-interest and timing requirements under the Clean Air Act.

On April 24, 2018, the EPA sent a letter to the MDEQ responding to the MDEQ's request for an opinion on SB 652 and SB 653. The EPA raised serious concerns with the Environmental Rules Review Commission proposed in SB 652 and the Permit Appeal Panel proposed in SB 653. The EPA opined that the creation of these bodies and the processes that accompany them would significantly impact how the MDEQ administered its federal programs, including under the Clean Water Act and Clean Air Act, and therefore that, under federal law, these program revisions would require formal submission to the EPA for review and approval. The EPA noted in particular that SB 652 and SB 653 lacked conflict-of-interest protections required under the Clean Air Act—namely, (1) that any board that approves permits have at least a majority of members who represent the public interest and

do not derive a significant portion of their income from persons subject to permits, and (2) that any potential conflicts of interest by board members be disclosed. The EPA further noted that SB 652, through its creation of the Environmental Rules Review Committee, raised concerns that a committee outside the MDEQ could override or dilute provisions in state rules that ensure that Michigan's environmental standards are at least as stringent as their federal counterparts. Finally, the EPA expressed concern that the processes imposed by SB 652 and SB 653 were so cumbersome and time-consuming that they contravened federal timing requirements for the promulgation of rules and the issuance of permits. The EPA stated that it was not in a position at that time to determine whether enactment of these proposed bills would trigger the withdrawal of Michigan's federally approved programs. Furthermore, the EPA said its review of these bills' revisions to Michigan's programs would be aided by an Attorney General opinion clarifying various aspects of how the legislation would operate and interact with federal requirements.

As amended, SB 652 and SB 653 were approved by the legislature, signed by the governor, and became Acts 267 and 268 on June 28, 2018.

Based on the foregoing, I seek your legal opinion on the following questions:

1. Do the bodies created by Act 267 and/or Act 268 violate federal conflict-of-interest requirements which the state is bound to follow in the administration of its federally approved environmental programs, including under the Clean Water Act and Clean Air Act? Among other possible violations, is the Environmental Rules Review Committee under Act 267 and/or the Environmental Permit Review Commission under Act 268 in violation of the board-composition and conflict-disclosure requirements of section 110(a)(2)(E) and section 128 of the Clean Air Act, which mandate that a majority of a board that approves permits must represent the public interest and not derive any significant portion of their income from persons subject to permits, and which also mandate the disclosure of any potential conflicts of interest that a board member may have?
2. Does Act 267 violate federal requirements, including those under the Clean Air Act and Clean Water Act, (1) by creating a body outside of the MDEQ that may override or dilute provisions in state rules that ensure that Michigan's environmental standards are at least as stringent as their federal counterparts, and/or (2) by impermissibly slowing down the process by which environmental rules are promulgated and permits are issued?
3. Does Act 268 violate federal requirements, including those under the Clean Air Act and Clean Water Act, regarding the timing and issuance of permits? In particular, does Act 268 violate federal law by impermissibly slowing down the permit issuance and/or review process?
4. For purposes of federal timing requirements, including those under the Clean Air Act, what is the effective date of a permit issued pursuant to the process created in either Act 267 or Act 268?

5. Under Act 267 and Act 268, what opportunity is afforded to other interested parties to comment, review, and appeal, and is this opportunity in violation of any federal requirements to that effect?
6. What impact do Act 267 and Act 268 have on federal program deadlines?

I would appreciate your attention to these questions of law. From lead-tainted water to PFAS contamination to foul-smelling emissions, the people of Michigan have faced increasing threats to their drinking water, their Great Lakes, and their way of life. At the same time, businesses that follow the rules deserve certainty and promptness in the permit review process. Thank you in advance for your attention to this request.

Sincerely,



Gretchen Whitmer
Governor